84-1207

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IN THE
SUPREME COURT OF THE UNITED STATES

No._____

October Term 1984

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, COMMISSIONER WILLIAM LEEKE, WARDEN GEORGE MARTIN AND STATE OF SOUTH CAROLINA AND THE ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA,

Petitioners,

vs

FLOYD M. DOBY, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

I.

WHETHER THE STATE TRIAL COURT'S INQUIRY OF DEFENSE PSYCHIATRISTS REQUIRED A CONCLUSION THAT IT IMPROPERLY RELIED ON THE TRUTH OF THE CONFESSION WHEN DETERMINING ITS ADMISSIBILITY?

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SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, COMMISSIONER WILLIAM LEEKE, WARDEN GEORGE MARTIN AND STATE OF SOUTH CAROLINA AND THE ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA,

Petitioners,

vs

FLOYD M. DOBY, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The Attorney General of South Carolina, on behalf of the named Petitioners and the State of South Carolina, petitions for a writ of

certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing and refusing the suggestion for rehearing en banc, filed October 29, 1984, is unreported and is appended hereto as Appendix A at page 29.

The opinion of the United States Court of Appeals for the Fourth Circuit entered August 16, 1984, vacating the judgment of the United States District Court for the District of South Carolina and remanding the case with direction to issue the writ of habeas corpus, reported at 741 F.2d 76, is appended hereto as Appendix B at page 31.

The opinion of the United States District Court denying the petition for a writ of habeas corpus is unreported and appended hereto as Appendix C at page 45.

The opinion of the Supreme Court of South Carolina affirming the conviction of murder in the direct appeal filed October 3, 1979, is reported at 273 S.C. 704, 258 S.E.2d 896 (1979), cert. den. 100 S.Ct. 739, and is appended hereto in its pertinent part as Appendix D at page 56.

JURISDICTION

The petition for certiorari is for review of the judgment of the United States Court of Appeals for the Fourth Circuit in a 28 U.S.C. § 2254 habeas corpus action entered on August 16, 1984. By order filed October 29, 1984,

the petition for rehearing and suggestion for rehearing en banc were denied.

This Court has jurisdiction to review the opinion rendered below pursuant to the provisions of 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is the following clause of the Fourteenth Amendment to the Constitution of the United States:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law ... .

STATEMENT OF THE CASE

This habeas corpus action, pursuant to the jurisdiction invoked under 28 U.S.C. § 2254, was filed against the officials of the State of South Carolina by Floyd Doby, who was convicted after a

jury trial of murder and is presently serving life imprisonment in a South Carolina prison. Doby's main contention in his habeas action was that the state trial court impermissibily relied upon the truth of his confession to murder in deciding to admit it. Petitioners submit the Court of Appeals erred in its review of the facts surrounding the introduction of the confession and the application of the law to those facts.

On February 26, 1976, Sally Ann Hutchinson was murdered in her home in Greenville County, South Carolina, as a result of stab wounds in her chest. There were no apparent signs of forced entry into her home. Although her clothes were disarranged, there was no evidence of sexual contact. Local law enforcement was unable to solve the

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crime until approximately two years later.

Around April 12, 1978, two police investigators, recently assigned to the investigation, were attracted to Doby, the Respondent herein, because he lived near the deceased's home and they had information that he had been hiding in ladies' public bathrooms throughout the city. (A. pp. 93-94, 101). On the afternoon of April 12, 1978, Doby voluntarily went to the Greenville City-County Law Enforcement Center to obtain information on a vocational rehabilitation center. (A. pp. 93, 98). The two police investigators learned that Doby was in the complex and asked him if he would mind talking to them. (A. p. 93). Doby consented and they went to the investigators' office. (A. p. 79).

After some preliminary questions on his background of where he lived, the investigators administered the Miranda warning. (A. p. 79). He waived his rights orally and signed a printed waiver of rights form. (A. pp. 75, 79-82). He was not then, nor at any time prior to his confession, placed under arrest. (A. p. 83).

Doby was interviewed for approximately two hours before the written confession was begun. (A. pp. 90-91). The session occurred during regular business hours. No threats or inducements were made by law enforcement. (A. pp. 91-92). Very few questions were asked and Doby provided a rambling narrative of the murder. (A. pp. 102, 110-111). During the meeting, Doby revealed to the investigators numerous matters that were previously

unknown to the particular interviewers including a description of the crime scene, the inside of the victim's home, the fact that the victim's husband drove a white Corvette, the details of the stabbing, and his accidental tear of the deceased's hose with the knife. (A. pp. 109-110, 195, 199, 202, 217-218, 238). During the interview session, the officers asked Doby if he wanted coffee and he said no that he would prefer a coke. (A. p. 88). His oral statement was then reduced to writing "just as the defendant told it," "in his own words." (A. pp. 89, 104). The statement was read aloud to Doby and then he read the statement himself and he made corrections before he signed it. (A. pp. 89-90). See: A. pp. 73-74.

During the June, 1978, trial, an in camera hearing on the admissibility of

the confession of April 12, 1978, was held. Officer William M. Hitchens testified to the version related above. The defense counsel called Dr. McFadden, a psychiatrist. (A. p. 112). Dr. McFadden testified that Doby was in the moderate retarded range, substantially unable to comprehend his Miranda rights, and that he was so dependent and so passive that if he understood his rights he would lack the aggressiveness and the assertiveness to insist on his rights. Of paramount importance, upon the defense counsel's own initial inquiry, Dr. McFadden testified that he believed with interrogation Doby could be led into confessing to anything and might even be led into believing he actually did something he didn't do based upon his psychological make-up. (A. pp. 116, 119, 120). The trial judge later asked

him that since he was of the opinion that Doby could confess to anything, whether he could explain how the Respondent confessed that the victim's pantyhose had been nicked with a knife, when the interviewers had no knowledge of it. (A. p. 126, ll. 4-15).

The defense continued this theory to object to the admissibility of the statement and called Dr. Edmond Camp. (A. p. 126). Dr. Camp testified that Doby had an IQ of 71, was borderline retarded and suffered from a passive-dependent personality disorder, and that he could not understand Miranda warnings. (A. pp. 129-130). The trial judge asked Dr. Camp the same question he asked Dr. McFadden. (A. p. 132). Again, on defense counsel's questioning, Dr. Camp was asked whether, in his opinion, it would be highly likely that

Doby could be led, if provided with the necessary information, into saying what authorities wanted him to say. (A. p. 133). Defense counsel continued on this same line of inquiry by asking if the questioner asked Doby, "Didn't or did you nick the pantyhose of the victim," that Doby would most likely answer yes to do what the questioner wants. (A. p. 133, 11. 17-24). Dr. Camp, upon defense counsel's inquiry, testified that it was entirely possible "that he made up a story as he went along with the investigators, that he, indeed, did kill this person, in order to comply with authority figures." (A. p. 135, 11. 4-17).

Doby testified during the in camera hearing that he gave the confession because "they talked about a lie

detector test." (A. p. 156, 11. 7-16, p. 161, 11. 6-16). Of primary importance, Doby acknowledged that the officers did not make him sign the statement or the warning of rights. (A. p. 162, 11. 11-17). Doby stated that he gave the statement "on my own free will." (A. p. 168, 11. 11-22).

After arguments by counsel, the trial court recessed. The next morning Judge Gentry issued his findings and conclusions on the admissibility of the confession. The state trial court stated:

> I find that there is no guide-line set by any court to date as to what level of mentality, established by intelligence quotient examinations, or otherwise, which will guide any court to define the word "understand."
>
> I've reviewed the testimony of the officers and witnesses for the defense, plus the testimony of the defendant him-

> self, and after careful consideration of the testimony as a whole, concluded that the defendant, Floyd Doby, Jr., freely and voluntarily delivered his statement, without any threats, or inducements, addressed to either fear or hope. Further, based upon the testimony as a whole, that at the time the Miranda warning was given to this defendant, that he understood those rights, and further, that he understood the contents of his statement.
>
> Further, I conclude that the statement was not induced through force or fear of force, or under duress or compulsion of any kind.
>
> Therefore, the statement is admitted into evidence. (A. p. 176, l. 14 - p. 177, l. 8).

After the conviction, the South Carolina Supreme Court found that the State met its burden, based upon the totality of the circumstances, including the background, experience, and conduct of the accused in showing that he voluntarily and intelligently waived his Fifth and Sixth Amendment rights, that

his mental deficiency alone was not sufficient to render his confession involuntary, and found to be without merit that the trial judge used an improper balancing test to determine voluntariness. State v. Doby, 273 S.C. 704, 708-710 (1979).

The District Court, upon its review, found that the consideration, if any, of the trial judge regarding the "truth" of the confession was made in investigation of the Petitioner's mental capacities to voluntarily give a confession rather than in an inquiry into the possible overbearing behavior of the State's law enforcement officials. (A. pp. 62-65). The Court of Appeals for the Fourth Circuit found that the state trial judge, by his inquiry of the

psychiatrists, relied upon the truth of the confession in determining its admissibility in violation of Rogers v. Richmond, 365 U.S. 534 (1961).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Creates An Intolerable Conflict With Other Circuit and State Courts and is Probably Not An Accord With the Decisions of This Court.

The essence of the holding by the Court of Appeals is that the South Carolina trial judge inquiry of the defense psychiatrists in an in camera proceeding concerning the admissibility of a non-custodial confession was error because it addressed the truth or reliability of the confession by a borderline mental retardate. This holding requiring a new trial is directly in conflict with the holding of the Fifth Circuit in U.S. v. Kreczmer,

636 F.2d. 108 (5th Cir. 1981). In Kreczmer, the Fifth Circuit found a situation where the magistrate found that the defendant's detailed statement was identical to what allegedly happened. The Fifth Circuit found the magistrate did not evaluate the truthfulness of the details; rather, he emphasized the fact that the appellant was capable of speaking in a narrative manner and that the narrative itself was coherent. The appellant in Kreczmer claimed that because of his intoxication, he was incapable of thinking rationally or exercising free will. The Fifth Circuit held that, in that situation, a trial court must inquire into his state of mind at the time of the ocnfession. In making this determination, the Court may consider, among other factors, the clarity and

coherence, but not the truthfulness, of the confession.

In the case before this Court, the situation was truly no different from Kreczmer. In the trial court, Doby contended that because he was suffering from a passive-dependent mental disorder, his confession was the product of the parroting of a suggested version by the detectives. (A. pp. 116, 119-120). This involuntariness claim was based not upon patently coercive conduct of the police, but rather that the methods used had a coercive effect due to Doby's psychological disorientation. He presented the testimony of two psychiatrists who testified that Doby was the type of person who would tell people what they wanted to hear in order to get approval. The trial court asked each doctor that

if he was capable of confessing to anything to satisfy authority figures, how could they explain that his confession revealed matters about the murder unknown to the particular interrogators. In inquiring that the confession contained facts known only to the accused, the trial judge was not passing upon the credibility or reliability of the statement, but was determining whether his claim that he was in a psychological condition of helplessness was accurate. Accord: Gilreath v. Mitchell, 705 F.2d 109 (4th Cir. 1983).

This was not the reliance upon the truth of the confession that is condemned by Justice Frankfurter in Rogers v. Richmond, supra, but it is a proper and necessary inquiry by the trial judge in deciding if a statement

is voluntary or is the result of improper interrogation which puts words into the mouth of the accused and overrides his free will. Certainly the truthfulness of the confession does not address the issue of whether law enforcement officers acted properly in obtaining the confession; but it is a relevant inquiry in cases where the trial judge is faced squarely with the issue of whether a defendant, because of his mental make-up, would have fabricated or parroted a confession merely to please officers when its inclusion of unknown facts of the crime contradicts the mental and emotional picture presented by defense psychiatrists in support of their position. Consideration of the totality of the circumstances surrounding the confession were proper in determining

whether it was a "product of a rational intellect and free will." U.S. v. Wertz, 625 F.2d 1128 (4th Cir. 1980). State v. Doby, supra.

In Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the Supreme Court, reasserting the position adopted in Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961), referred to the defendant's constitutional right at some stage in the proceedings to object to the use of a confession and to have a fair hearing and a reliable determination on the issue of voluntariness, uninfluenced by the truth of falsity of the confession. The case arose in the state courts of New York where the issue of voluntariness had been submitted to the jury. The Supreme Court said:

> The obvious and serious danger is that the jury disregarded or disbelieved

> Jackson's (the defendant's) testimony pertaining to the confession because it believed he had done exactly what he was charged with doing.

Jackson v. Denno, supra, 378 U.S. at 383. Referring to its decision in Rogers v. Richmond, supra, the Court continued:

> The reliability of a confession has nothing to do with its voluntariness--proof that a defendant committed the act with which he is charged and to which he has confessed is not to be considered when deciding whether a defendant's will has been overborne.

Jackson v. Denno, supra, 378 U.S. at 384, 84 S.Ct. 1774, 1785. The Court set out its underlying rationale as follows:

> It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that

> are obtained in a manner deemed coercive, but also because of the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will,' Blackburn v. State of Alabama, 361 U.S. 199, 206-207, 80 S.Ct. 274, 280, 4 L.Ed.2d 242, and because of 'the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.' Spano v. New York, 360 U.S. 315, 320-321, 79 S.Ct. 1202, 3 L.Ed.2d 1265.

Jackson v. Denno, supra, 378 U.S. at 385-386, 84 S.Ct. at 1785.

Our reading of Rogers v. Richmond, supra, leads to the conclusion that the concern regarding consideration of the probable truth or falsity arose there in the context of inquiring into the details of the interrogation, i.e., the conduct of the state officials. This reading is supported by the following

passage where the court held that the question whether the confession was voluntary and admissible,

> was answered by reference to a legal standard which took into account the circumstance of probable truth or falsity. And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment. The attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined--a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth. (Emphasis added).

Rogers v. Richmond, 365 U.S. 534, 543-544, 81 S.Ct. 735, 741.

The inquiry by the court was not to determine whether Doby told the truth, but whether he in fact had the psychological make-up that the defense attorneys were asserting that he had. It was also not to determine the reliability of the confession. Doby's

mental make-up was being asserted to show, that because of his passive-dependent state, as reflected by merely parroting back words of law enforcement to gain acceptance, he could not waive his Miranda rights. The court's inquiry was based on its desire to determine if the mental state of the defendant was as the psychiatrists profiled, a profile that would reject Doby's assertiveness in stating rationally facts previously unknown by the police. Contrary to the Fourth Circuit's opinion, as supported by defense counsel's inquiry, the trial court did make these inquiries "with an eye toward determining his mental state at the time of the confession."

This conclusion is further supported by the trial court's findings after the in camera hearing and discussion with counsel about standard to use. The trial court held:

> I find that there is no guideline set by any court to date as to what level of mentality, established by intelligence quotient examinations, or otherwise, which will guide any court to define the word "understand."
>
> I've reviewed the testimony of the officers and witnesses for the defense, plus the testimony of the defendant himself, and after careful consideration of the testimony as a whole, concluded that the defendant, Floyd Doby, Jr., freely and voluntarily delivered his statement, without any threats, or inducements, addressed to either fear or hope. Further, based upon the testimony as a whole, that at the time the Miranda warning was given to this defendant, that he understood those rights, and further, that he understood the contents of his statement.
>
> Further, I conclude that the statement was not induced through force or fear of force, or under duress or compulsion of any kind.
>
> Therefore, the statement is admitted into evidence. (A. p. 176, l. 14 - p. 177, l. 8).

Strangely, the Circuit Court's decision wholly failed to address or distinguish his findings on the precise issue presented. Furthermore, the instruc-

tions to the jury, unlike the instructions in Rogers v. Richmond, 365 U.S. 534 (1961), the charge properly stated the law and did not equate "truth" with admissibility. This supports the court's recognition of the proper standard.

The Circuit Court's opinion improperly emphasized the court's statement to the jury after the verdict was entered. The Court unfortunately failed to present the true picture by presenting his words immediately preceding:

> I've never quarrelled with a jury's verdict. I don't believe its within the province of a trial court to criticize a jury's verdict, or comment, but there was no question for this jury except murder or not. He's either guilty or not guilty ... . There was no evidence of any justifiable homicide, no evidence of self-defense ... . It was a unique situation in which the court found itself. I can now announce ... . (App. p. 317).

The judge further told the jury "despite the psychiatrist's testimony, I think he knew what he was doing." (App. p. 318). These facts were overlooked by the Circuit Court that singularly reflect his discussion after trial was not concerned with the statement's admissibility but his belief in the jury's correct decision and that alone.

The decision by the Circuit Court here moved far beyond the rational safeguards concerning the admissibility of confessions set up in Rogers and into a bright-line rule that prevents a trial judge from fully inquiring about the totality of the circumstances when the defendant raises an issue concerning his mental make-up at the time of the confession. The Circuit Court abandoned the state court findings to an aura of speculation. There is nothing to

support any conclusion that either the trial judge or jury considered the truth of the confession itself as the factor in determining its admissibility or that the confession itself was not freely and voluntarily given.

CONCLUSION

Based on the foregoing, the writ of certiorari should issue to review the decision of the Court of Appeals in this case.

Respectfully submitted,

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January 25, 1985

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-6009

FLOYD M. DOBY, JR.,

Appellant.

v.

South Carolina Department of Corrections, Commissioner William Leeke, Warden George Martin and State of South Carolina and the Attorney General of the State of South Carolina,

Appellees.

O R D E R

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. In a requested poll of the Court, the suggestion for rehearing in banc did not carry, by reason of a tie vote. Judge Winter, Judge Phillips, Judge Murnaghan, Judge

Sprouse and Judge Ervin voted against rehearing in banc. Judge Russell, Judge Widener, Judge Hall, Judge Chapman and Judge Wilkinson favored rehearing in banc,

The panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan for a panel consisting of Judge Murnaghan, Judge Sprouse, and Judge Hallanan (U.S.D.J.).

For the Court,

s/John M. Greacen
CLERK

Filed October 29, 1984

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-6009

FLOYD M. DOBY, JR.,

Appellant.

v.

South Carolina Department of Corrections, Commissioner William Leeke, Warden George Martin and State of South Carolina and the Attorney General of the State of South Carolina,

Appellees.

Appeal from the United States District Court for the District of South Carolina, at Columbia. C. Weston Houck, District Judge.
(C/A 81-2527-2)

Argued: 6/8/84 Decided: 8/16/84

Before MURNAGHAN, Circuit Judge, SPROUSE, Circuit Judge, and HALLANAN, District Judge.*

John I. Mauldin and Stephen J. Henry for Appellant; T. Travis Medlock, Attorney General and Donald J. Zelenka, Assistant Attorney General for Appellee.

* The Honorable Elizabeth V. Hallanan, United States District Judge for the Southern District of West Virginia, sitting by designation.

APPENDIX B

HALLANAN, District Judge:

This is an appeal from the district court's denial of Appellant's petition for a writ of habeas corpus. Following a jury trial in South Carolina State Court, Appellant was convicted of murder. His conviction was affirmed by the Supreme Court of South Carolina on October 3, 1979. State v. Doby, 273 S.C. 704, 258 S.E.2d 896, cert. denied, 444 U.S. 1048 (1979). Appellant's main contention on appeal is that the trial court impermissibly relied upon the truth of his confession in deciding to admit it, thus directly violating the mandates of Rogers v. Richmond, 365 U.S. 534 (1961). We agree with Appellant and reverse the district court.

The facts pertinent to this appeal concern the in camera hearing held during Appellant's state court trial for

the purpose of determining the voluntariness of Appellant's confession. Jackson v. Denno, 378 U.S. 368 (1964). At the hearing, Appellant presented several psychiatrists who testified to facts regarding Appellant's psychological make-up and intellectual capacity. The purpose of such testimony was to show that Appellant was mentally deficient and, therefore, was unable to understand his Miranda rights so as to knowingly and intelligently waive them.

During the psychiatrist's testimony, the trial judge posed questions that strongly suggest he was concerned with whether Appellant had been truthful in giving his confession. For example, Judge Gentry asked Dr. Camp: "When he [Appellant] said that he did commit the crime, is it possible that he was telling the truth?" Joint

Appendix at 136. Again, the trial judge asked Dr. Camp: "Is it reasonable to assume that he [Appellant] was there and did it?" Id. at 147.

Following this psychiatric testimony, the defense counsel argued to the trial court that it should consider this evidence on the issue of the voluntariness of Appellant's waiver of his Fifth and Sixth Amendment rights. At this time the trial court and defense counsel engaged in the following dialogue:

> [Defense Counsel - Mr. Allen]
> I feel like that the Court should consider the most relevant things we've brought out, not only Floyd's testimony both direct and cross, not so much what the questions were, but what the Court saw, and how he responded.
> And also the doctor's background information on him, his performance level in school, his IQ, his psychological diagnosis, and all these

things just go to the fact that he could not have intelligently waived his Miranda rights. That's really the only issue we're talking about.
THE COURT: How about the truth?
MR. ALLEN: Sir?
THE COURT: How about the truth? Truth.
MR. ALLEN: I don't understand the question.
THE COURT: How about the truth? you say we're not concerned with anything except his understanding of his Miranda rights.
MR. ALLEN: In this hearing.
THE COURT: Oh, yeah, yeah. Do you have any law on the middle ground between truth and legal right?
MR. ALLEN: No sir, I mean -
THE COURT: Is there any?
MR. ALLEN: Explain your question, please, I don't understand it.
THE COURT: Do you have any law on the middle ground between truth and legal right? I don't think I've ever seen any, have you?
MR. ALLEN: No sir, I haven't. I'm not sure exactly what the Court's asking, but I do have the law on the fact --
THE COURT: That's the dilemma that I'm in.
MR. ALLEN: Well, sir, it seems certainly arguable --

> THE COURT: It's a real dilemma.
> MR. ALLEN: -- and goes to the totality of the circumstances, and these officers, being officers of the Court as you and I are, should have provided that man, after they saw; and they can't deny that they saw the type of person Fooyd [sic] is, that is readily apparent, I don't think any one would deny that; even after seeing that they did not afford him counsel, because Floyd didn't know to ask for it, because he didn't understand it.

Joint Appendix at 173-174.

The day after the in camera hearing, the trial court allowed Appellant's confession to be admitted into evidence.

After the jury had returned its verdict, Judge Gentry addressed the jurors in the following manner:

> [Trial Court]:
> I can announce in the present [sic] of this jury now, however, that during the in-camera hearing on the admissibility of the alleged confession, after hearing the psychiatrists and after hearing the officers, and the manner in

> which the statement was taken, as I instructed the jury following that some two-three hour hearing Tuesday night - or was it Monday night, I've forgotten - whatever, I concluded as a matter of law that the jury was entitled to consider that. After hearing the confession I became convinced in my own mind that some of the contents of that document could have been known only to the killer of Sally Ann Hutchinson. I won't go into enumerating them.

Joint Appendix at 317.

It is clear from the language used by the trial judge in questioning the psychiatrists and defense counsel, as well as addressing the jurors, that he considered the truth of Appellant's confession in deciding its admissibility. Rogers v. Richmond, supra, prohibits a trial judge from relying upon the truthfulness of a confession when deciding whether it should be admitted as a voluntary statement of the accused. Rogers states:

> From a fair reading of these expressions, we cannot but conclude that the question whether Rogers' confessions were admissible into evidence was answered by reference to a legal standard which took into account the circumstance of probable truth or falsity. And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment. The attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and to bring about confessions not fully self-determined - a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth. The employment instead, by the trial judge... of a standard infected by the inclusion of references to probable reliability resulted in a constitutionally invalid conviction....

365 U.S. at 543-44.

The purpose of a Jackson v. Denno hearing is to determine the voluntariness of a confession, and

during such hearing the trial judge is "duty-bound to ignore implications of reliability...and to shut from his mind any internal evidence of authenticity that a confession itself might bear." Lego v. Twomey, 404 U.S. 477, 484 n.12 (1972).

The Appellees argue that the trial judge was not concerned with the truthfulness of Appellant's confession. Rather, they contend that the trial judge pursued this line of questioning in order to determine whether Appellant had the mental capacity to voluntarily waive his rights. That is, if Appellant fabricated his confession to merely please the officers, how could he have confessed to details about the crime previously unknown to the officers?[1] Thus, the trial judge had to examine the confession to determine whether it

was the produce of Appellant's free will.

In support of their proposition, Appellees rely upon Gilreath v. Robinson, 544 F. Supp. 569 (1982), aff'd sub nom. Gilreath v. Mitchell, 705 F.2d 109 (1983). In Gilreath v. Robinson, Appellant contended that the trial judge improperly relied upon the truth of his confession by referring to facts of the confession known only to the accused. But this Court found that the trial judge did not violate the dictates of Rogers:

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[1]The investigating officers testified that during his confession, Appellant stated that he accidentally nicked the victim's right leg with the murder weapon. The officers allegedly had no prior knowledge of this fact, but were able to verify it by checking photographs of the victim contained in the police file, only after receiving the information from the Appellant.

> A careful reading of the ten pages of trial transcript in which the judge discussed his findings and his reasons for admitting the confession clearly shows that a belief in the truthfulness of the confession was not a reason for admission. In mentioning that the confession contained facts known only to the accused, the trial judge was not passing upon the credibility of the statement, but was answering the appellant's claim that at the time of the confession he was in a psychotic state or a condition of complete helplessness where he could do no more than "to parrot back a story that was implanted in his mind by someone else of fantasy." This is not the reliance upon truth of a confession that is condemned by Justice Frankfurter in Rogers, but is a proper inquiry and finding by the trial judge in deciding if a statement is voluntary or is the result of improper interrogation which puts words into the mouth of the accused and overrides his free will. See also United States v. Kreczmer, 636 F.2d 108, 110-11 (5th Cir. 1981).

Gilreath, 705 F.2d at 110.

But Gilreath can be distinguished from the present case. The trial judge in the present case did not raise the issue of the previously unknown facts with an eye toward determining Appellant's mental state at the time of the confession. Rather, he was convinced that Appellant's confession must be true because he knew these facts previously unknown to the interrogating officers.[2] This is apparent in his questions to the psychiatrists and confirmed in his final speech to the jurors.

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[2]In questioning Dr. McFadden, the trial judge came close to a "proper inquiry" of the type used by the trial judge in Gilreath. However, Judge Gentry stopped short by again returning to the issue of the veracity of Appellant's confession:

> THE COURT: Well, at one point in your testimony you stated that you thought with the proper,

The Court finds that the trial court violated Rogers v. Richmond by relying upon the truth of Appellant's confession in determining its admissibility. Accordingly we vacate the judgment of

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[2](continued) suitable circumstances you could get Floyd Doby to confess to anything, is that right?
DR. McFADDEN: Yes Sir.
THE COURT: How would you explain, in this particular case for example, the defendant telling the investigators, Hitchens and Blankin, if they were the only two in the room at that time, about him inadvertently nicking the deceased's panty hose, of which they had no knowledge at the time, and later that the right panty leg had been nicked, and a hole appeared?
DR. McFADDEN: I couldn't explain that.
THE COURT: I mean, he

the district court and remand with instructions that the writ of habeas corpus be issued, first allowing South Carolina a reasonable time in which to commence a new trial on the charges, should it so choose.

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[2](continued) just couldn't have been confessing to that unless he had some intimate knowledge of that fact, could he?
DR. McFADDEN: It would sound that way.
THE COURT: Thank you, sir."
Joint Appendix at 125-26.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

FLOYD M. DOBY, JR., Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, COMMISSIONER WILLIAM LEEKE, WARDEN GEORGE MARTIN and THE STATE OF SOUTH CAROLINA, Respondents.	C/A #81-2527-2 O R D E R

This matter comes before this court on the petitioner's exceptions of the magistrate's report, which recommends the denial of petitioner's application for habeas corpus relief and the granting of respondents' motion for summary judgment, pursuant to Rule 56 and Rule 12(b)(6) of the Federal Rules of Civil Procedure.

APPENDIX C

The petitioner's application for a write of habeas corpus under 28 U.S.C. §2254 was originally referred to a federal magistrate, pursuant to 28 U.S.C. §636(b)(1)(B) and this court's order of January 18, 1979. The magistrate's report and recommendation were filed on May 11, 1982, and the petitioner duly filed his objections within the 10-day period.[1]

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[1] 28 U.S.C. §636(b)(1)(B) provides that a district court may refer to a federal magistrate applications for post-trial relief made by individuals convicted of criminal offenses. Following the submission of the magistrate's report and recommendations, the petitioner may object to it in whole or in part. The recommendations are no more than what they purport to be. The district court may accept, reject or modify all, or part or none of the recommendations. The district court, however, is obligated to make a de novo determination of those portions of the magistrate's report to which the petitioner objects. Upon such a review, it may take further evidence, or may recommit the matter to the magistrate, or may accept, reject or modify the magistrate's report and recommendations.

Petitioner objects to the magistrate's report and recommendation on the basis of the magistrate's conclusion that the petitioner failed to establish error by the state courts under 28 U.S.C. §2254(d). In particular, the petitioner claims that he has established that the "merits of the factual dispute were not resolved in the State Court hearing," 28 U.S.C. §2254(d)(1), that the "material facts were not adequately developed at the State Court hearing," 28 U.S.C. §2254(d)(3), and that the "applicant did not receive a full, fair and adequate hearing in the State Court proceeding," 28 U.S.C. §2254(d)(6). The petitioner submits that these allegations show a denial of due process in the state court proceeding as contemplated by 28 U.S.C. §2254(d)(7). In addition, the

petitioner excepts to the magistrate's recommendation that no showing was made by convincing evidence that the factual determinations of the state courts were errouneous, as well as to the finding that petitioner failed to establish grounds for an evidentiary hearing.

At the heart of the petitioner's complaint lies the allegation that the trial court used an improper and incorrect balancing test to determine the admissibility of a confession made by the petitioner, resulting in the improper admission of the confession. The petitioner contends that the state courts failed to apply Rogers v. Richmond, 365 U.S. 534 (1960), in that the trial judge improperly interjected his own opinion as to the truth of the confession into the totality of the circumstances, Spano v. New York, 360

U.S. 315 (1959), surrounding the alleged waiver of petitioner's Miranda v. Arizona, 384 U.S. 436 (1966), rights.

The issue before this court is whether an improper test was used in determining the voluntariness of the confession, thereby resulting in an errouneous admission into evidence of the confession. "A confession is involuntary and subject to suppression when induced by such duress or coercion, express or implied, that the accused's 'will has been overborne and his capacity for self-determination circitically [sic] impaired,' and his statement was not 'the product of a rational intellect and a free will.'" United States v. Wertz, 625 F.2d 1128, 1133 (4th Cir. 1980) (citations omitted). To determine voluntariness under this rule, one must look at the

"totality of all the surrounding circumstances - both the characteristics of the accused and the details of the interrogation." Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). "The circumstances to be considered in resolving the issue include the setting in which the confession and, particularly, as Schneckloth puts it, 'the characteristics of the accused' such as his youth, experience, education, maturity, or intelligence." Wertz, supra, at 1134. Thus, the inquiry into the voluntary nature of a confession will involve an assessment of one or both of the two interrelated aspects: the details of the interrogation and the characteristics of the accused.

Our reading of Rogers v. Richmond, supra, leads us to the conclusion that

the concern regarding consideration of the probable truth or falsity arose there in the context of inquiring into the details of the interrogation, i.e., the conduct of the state officials. This reading is supported by the following passage:

> From a fair reading of these expressions, we cannot but conclude that the question whether Rogers' confessions were admissible into evidence was answered by reference to a legal standard which took into account the circumstances of probable truth or falsity. And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment. The attraction of the trial judge should have been focused, for the purposes of the Federal Constitution, on the question whether the behavior of the state's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined - a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth. (emphasis added)

Rogers, supra, at 543-44. It appears clear from a complete review of the

record that the consideration, if any, of the trial judge regarding the "truth" of the confession was made in investigation of the petitioner's mental capacity to voluntarily give a confession rather than in an inquiry into the possible overbearing behavior of the state's law enforcement officials, as contemplated by Rogers.[2] In order to make a thorough examination of the totality of the circumstances, Spano v. New York, 360 U.S. 315 (1959), it is necessary to inquire into

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[2]The transcript of the hearing to determine the admissibility of the confession, Tr. 160-258, shows that references to the issue of the truth contained in the confession arose in connection with the testimony of the psychiatrists who testified for the defense (Tr. 120; 216), and in regards to the defense attorney's arguments concerning consideration of the petitioner's mental capacity (Tr. 257-58).

characteristics of the accused, including his mental capacity, as was done here. Although subnormal intelligence is often a paramount factor in the "totality" test which results in the determination of involuntariness, that factor standing alone will not render an otherwise voluntary confession involuntary. United States v. Young, 529 F.2d 193 (4th Cir. 1975). Read in its entirety, the transcript of the hearing makes clear that the truthfulness of the confession was not a factor in the judge's finding of voluntariness.[3] United States v. Kreczmer, 636 F.2d 108 (5th Cir. 1981).

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[3]The trial judge made the following findings:

"I reserved making any decision on the question of the admissibility of the statement until this morning.

"I find that there is no guideline set by any court to date, as to what level of mentality, established by intelligence quotient examinations, or otherwise, which will guide any court to define the word 'understand.'

"I've reviewed the testimony of the officers and witnesses for the defense, plus the testimony of the defendant himself, and after careful consideration of the testimony as a

rights.[4] The Supreme Court of South Carolina reviewed the petitioner's complaints of error, State v. Floyd M. Doby, Jr., 258 S.E.2d 896 (1979), cert. denied, 444 U.S. 1048 (1980), and found no merit in either the claim of petitioner's inability to voluntarily waive his Miranda rights or in the claim that the trial judge used an improper balancing test. Resolutions by the state court of disputed factual issues, evidenced by reliable and adequate written indicia, are presumptively correct unless the federal court "on a consideration of...the record as a whole concludes that such factual determination is not fairly supported by the record." 28 U.S.C. §2254(d)(8). This court finds that none of the eight enumerated criteria under §2254(d) is present, and that the petitioner has failed in his burden to establish by convincing evidence that the factual determination of the state court was Sumner v. Mata, 449 U.S. 539 (1981).

Having effected the contemplated review, this court cannot assert that the state court's resolution of the disputed factual issues is not fairly

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[4]The burden of proof in determining voluntariness is a preponderance of the evidence rather than the higher standards of beyond a reasonable doubt. Legov. Twomey, 404 U.S. 477 (1972); United States v. Johnson, 495 F.2d 378 (4th Cir. 1974). This court cannot say that the trial judge was in error in finding this burden was met.

supported by the record as a whole. Since the petitioner has raised no new matter, summary disposition is proper under Rule 56 of the Federal Rules of Civil Procedure, Adickes v. S.H. Kress Co., 393 U.S. 144 (1970). The magistrate's findings and recommendations are, therefore, accepted and adopted by this court and its order, and the Clerk shall enter order for the Respondents.

AND IT IS SO ORDERED.

C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

Dated at:

Florence, South Carolina

August 23, 1983.

The State, Respondent,

v.

Floyd M. Doby, Jr., Appellant.

No. 21062.

Supreme Court of South Carolina.

October 3, 1979.

NESS, Justice:

Appellant Doby was convicted of murder and sentenced to life imprisonment. We affirm.

Sally Ann Hutchinson died from a stab wound to her chest. There were no signs of forced entry into her home, and although her clothes were disarranged, there was no evidence of sexual contact. Appellant confessed to her murder two years later.

* * *

Appellant next asserts it was error to admit his confession into evidence. He claims he did not voluntarily and intelligently waive his Fifth and Sixth Amendment rights. We disagree.

The following facts were developed

at the Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, 1 A.L.R.3d 1205 (1964) hearing. On the afternoon of the confession, appellant voluntarily went to the Greenville City-County Law Enforcement Center to obtain information on a vocational rehabilitation program. While there, two police investigators asked appellant if he would mind talking with them. Appellant consented and they went to the investigators' office.

After some preliminary questions on appellant's background, the investigators administered Miranda warnings. Appellant waived his rights both orally and by signing a printed waiver of rights form. He was not then, nor at any other time prior to his confession, placed under arrest.

[2, 3] We hold that Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), is inapplicable to these facts. Miranda applies "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977), quoted in State v. Neeley, 271 S.C. 33, 244 S.E.2d 522 (1978).

[4-6] Simply because the interview took place at the Law Enforcement Center and at the initiation of

police investigators did not render it a "custodial interrogation." Rather, the fact appellant voluntarily agreed to accompany the investigators to their office and answer questions without being placed under arrest indicates a noncustodial situation. See Oregon v. Mathiason, supra; Barfield v. Alabama, 552 F.2d 1114 (5th Cir. 1977); State v. Neeley, supra. Moreover, the mere giving of Miranda warnings did not convert the otherwise noncustodial situation into custodial interrogation." U.S. v. Akin, 435 F.2d 1011 (5th Cir. 1970); U.S. v. Owens, 431 F.2d 349 (5th Cir. 1970); State v. Neeley, supra.

[7] Even if Miranda is applicable, we believe its requirements were fulfilled. The investigators read appellant his rights from a printed waiver form. They then handed it to him for his own inspection. After appellant read one sentence aloud and appeared to read the rest to himself, he acknowledged his waiver both orally and in writing.

[8, 9] The signing of the waiver form alone is not conclusive; the State still has the burden of showing the waiver was voluntary. State v. Pendergrass, 270 S.C. 1, 289 S.E.2d 750 (1977). This requires an examination of the totality of the circumstances surrounding the waiver, Schneckloth v. Bustamonte, 412 U.S. 218, 93

S.Ct. 2041, 36 L.Ed.2d 854 (1973), including the background, experience, and conduct of the accused. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938); United States v. Hayes, 385 F.2d 375 (4th Cir. 1967), cert. den., 390 U.S. 1006, 88 S.Ct. 1250, 20 L.Ed.2d 106 (1968); State v. Pendergrass, supra.

[10] The session occurred during regular business hours. One of the investigators testified that no treats [sic] or inducements were made, very few questions were asked, and appellant willingly provided a rambling narrative of the murder. The actual oral confession was made in only two hours. These facts are analogous to those in State v. Neeley, supra, and tend to prove the voluntariness of appellant's waiver.

The most damaging testimony at the Jackson v. Denno hearing was elicited from appellant himself. When asked whether the officers had forced him to give the confession, appellant responded that he "did it on my own free will." In light of these facts, we hold that appellant voluntarily and intelligently waived his Fifth and Sixth Amendment rights.

[11, 12] Appellant also argues he lacked the necessary mental

capacity to understand and assert his rights and, therefore, to voluntarily and intelligently waive them. "We have consistently held that mental deficiency along is not sufficient to render a confession involuntary but that it is a factor to be considered along with all of the other attendant facts and circumstances in determining the voluntariness of the confession. State v. Cain, 246 S.C. 536, 144 S.E.2d 905; State v. Callahan, 263 S.C. 35, 208 S.E.2d 284." In Re Williams, 265 S.C. 295, 301, 217 S.E.2d 719, 722 (1975). We believe the same principle applies where the issue is the voluntariness of a defendant's waiver of his constitutional rights. See United States v. Young, 529 F.2d 193 (4th Cir. 1975); Boulden v. Holman, 257 F.Supp. 1013 (D.C.Ala. 1966); Miller v. State, 240 Ga. 110, 239 S.E.2d 524 (1977).

[13] Appellant further asserts the trial judge issued an improper balancing test to determine the voluntariness of his confession. This is without merit. The record reveals a detained inquiry into the totality of circumstances surrounding the confession and an express finding, based upon all the testimony adduced at the Jackson v. Denno hearing, that it was freely and voluntarily given. Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619,

30 L.Ed.2d 618 (1972); State v. Neeley supra.

* * *

Affirmed.

LEWIS, C.J., LITTLEJOHN, RHODES and GREGORY, JJ. concur.

ORIGINAL

FILED
APR 24 1985
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

No._____

October Term 1984

84-1207

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, COMMISSIONER WILLIAM LEEKE, WARDEN GEORGE MARTIN AND STATE OF SOUTH CAROLINA AND THE ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA,

Petitioners,

vs.

FLOYD M. DOBY, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ATTORNEYS FOR THE RESPONDENT

IN THE
SUPREME COURT OF THE UNITED STATES

No._____

October Term 1984

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, COMMISSIONER WILLIAM LEEKE, WARDEN GEORGE MARTIN AND STATE OF SOUTH CAROLINA AND THE ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA,

Petitioners,

vs.

FLOYD M. DOBY, JR.,

Respondent.

THE CASE

The Respondent, an indigent, is incarcerated in the South Carolina Department of Corrections where he has resided since his murder conviction and life sentence on June 15, 1978. This case was initiated in federal district court by Respondent on November 11, 1981 pursuant to 28 U.S.C. Section 2254. Respondent's case has focused from its initiation on one primary contention: That the trial judge impermissibly relied upon the truth of Respondent's alleged confession when determining its admissibility. The district court denied habeas corpus relief on August 29, 1983 and the Fourth Circuit Court of Appeals panel unanimously reversed and remanded with direction to issue the requested writ at 741 F.2d 76. Petitioner's subsequent petition for rehearing was also rejected by a unanimous panel. Petitioner now seeks a writ of certiorari claiming that the Fourth Circuit's decision granting relief creates an "intolerable conflict with other circuit and state courts and is probably not an (sic) accord with the decisions of this court."

SUMMARY OF ARGUMENT

The decision below was in accordance with the body of law that has, since Rogers v. Richmond, 365 U.S. 534 (1961), made impermissible the reliance upon the truth of a confession on the part of a trial judge in determining that confession's admissibility and is not in conflict with the Fifth Circuit Court of Appeals decision in United States v. Kreczmer.

ARGUMENT

I. The lower court decision does not conflict with U.S. v. Kreczmer in that in both decisions the principle was upheld that it is impermissible for a trial judge to consider the truth or falsity of a confession in ruling on its admissibility.

In U.S. v. Kreczmer, 636 F.2d 108 (5th Cir., 1981) the Fifth Circuit clearly and strongly stated the Rogers v. Richmond, 365 U.S. 534 (1961) principle relied upon by the lower court in the instant case:

> "In Rogers v. Richmond, citations omitted, the Supreme Court held that it is impermissible to consider the truth or falsity of a confession in ruling on its voluntariness. This decision has been adhered to consistently and implemented both in decisions of the Supreme Court and of this court."

Both Kreczmer and the lower court decisions merely reaffirm the Rogers principle. That different factual backgrounds lead to ultimately different conclusions does not, as Petitioner seems to argue, create an intolerable conflict requiring resolution by the United States Supreme Court. That different facts produce different results is not a basis for a writ of certiorari.

Quite clearly, the Fifth and Fourth Circuits, applying the Rogers principle correctly and consistently, found in one case (Kreczmer) that the trial judge had not considered the truthfulness of the confession as an admissibility factor and in the other case (Doby) that the truthfulness had been a factor. The two courts reached different results on their particular facts. The principle applied in each case remained true to Rogers. No conflict exists. Factual distinctions such as exist here must be tolerated.

II. The lower court decision reflects the recognition of a blatant violation of Rogers v. Richmond not present in U.S. v. Kreczmer.

For the sake of maintaining its tenuous foot-hold on a slippery position, Petitioner selectively omitted the abundant references by the trial court to the alleged truthfulness of Respondent's confession.

This selective omission is purposeful since in Kreczmer the Fifth Circuit relied heavily on the fact that:

> "In the entire report, the magistrate mentioned the truthfulness of the confession only in the single statement quoted above." at page 110.

The passing reference by the magistrate led the Kreczmer court to conclude that "the truthfulness of the confession was not a factor."

Quite apparently the lower court, applying the principle of Rogers and Kreczmer was required to find a violation in the face of the overwhelming evidence that the truthfulness of the confession was a factor in the trial judge's decision to admit it into evidence.

The lower court quoted the extensive comments by the trial judge to defense counsel, witnesses and to the jury which clearly showed that the trial judge here, unlike the magistrate in Kreczmer, relied upon the alleged truthfulness in deciding the confession's admissibility. These comments include the "what about the truth" colloquy quoted below:

> "(Defense Counsel - Mr. Allen)
> I feel that the Court should consider the most relevant things we've brought out, not only Floyd's testimony both direct and cross, not so much what the questions were, but what the Court saw, and how he responded.
> And also the doctors' background information on him, his performance level in school, his IQ, his psychological diagnosis, and all these things just go to the fact that he could not have intelligently waived his Miranda rights. That's really the only issue we're talking about.

THE COURT: How about the truth?
MR. ALLEN: Sir:
THE COURT: How about the truth? Truth.
MR. ALLEN: I don't understand the question.
THE COURT: How about the truth? you say we're not concerned with anything except his understanding of his Miranda rights.
MR. ALLEN: In this hearing.
THE COURT: Oh, yeah, yeah.
Do you have any law on the middle ground between truth and legal right?
MR. ALLEN: No sir, I mean -
THE COURT: Is there any?
MR. ALLEN: Explain your question, please, I don't understand it.
THE COURT: Do you have any law on the middle ground between truth and legal right?
MR. ALLEN: No sir, I haven't. I'm not sure exactly what the Court's asking, but I do have the law on the fact --
THE COURT: That's the dilemma that I'm in.
MR. ALLEN: Well, sir, it seems certainly arguable --
THE COURT: It's a real dilemma.
MR. ALLEN: -- and goes to the totality of the circumstances, and these officers, being officers of the Court as you and I are, should have provided that man, after they saw; and they can't deny that they saw the type of person Fooyd (sic) is, that is readily apparent, I don't think any one would deny that; even after seeing that they did not afford him counsel, because Floyd didn't know to ask for it, because he didn't understand it."

This entire dialogue during the in camera hearing on the issue of the confession's admissibility appeared in the trial record and was quoted in its entirety in the lower court's opinion. It would be difficult to imagine more conclusive evidence that the judge in this case did consider the truthfulness. It is evident that the Kreczmer magistrate's passing one-line reference to the truth of the defendant's statement in that case followed immediately by the statement that he was "not passing on its truthfulness" is not in the same league with Respondent's trial judge's steadfast determinaiton that the truth would be a factor in his ruling.

By itself, the "what about the truth" colloquy is enough of a distinction between the present case and the Kreczmer result. However, in addition, the trial judge pursued the "truth" issue with a psychiatric witness and even after the verdict with the jurors as follows:

> "(Trial Court):
> I can announce in the present (sic) of this jury now, however, that during the in-camera hearing on the admissibility of the alleged confession, after hearing the psychiatrists and after hearing the officers, and the manner in which the statement was taken, as I instructed the jury following that some two-three hour hearing Tuesday night - or was it Monday night, I've forgotten - whatever, I concluded as a matter of law that the jury was entitled to consider that. After hearing the confession I became convinced in my own mind that some of the contents of that document could have been known only to the killer of Sally Ann Hutchinson. I won't go into enumerating them."

Can there be any doubt that the trial court violated Rogers, and indeed the Rogers principle recognized in Kreczmer? Petitioner can succeed on this issue only if the principle in Rogers itself is reversed. There is no basis upon which to conclude that Kreczmer and the lower court decision are fundamentally at odds.

CONCLUSION

The rationale for granting certiorari to resolve conflicts among the circuits is to achieve a uniform application of federal law in the intermediate federal court system. Petitioners have not, in accordance with Rule 17 of this Court, presented a sufficient conflict since any conflict between the Fifth and Fourth Circuit decisions cited, can be accounted for on the basis of variations in the factual situations presented in the two cases. Each case is totally consistent with this Court's ruling in Rogers v. Richmond. There having been no conflict demonstrated among the circuits, the petition for writ of certiorari should be denied.

Respectfully submitted by:
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STEPHEN JOHN HENRY

By: Stephen J. Henry
Attorneys for the Respondent

Greenville, South Carolina

Date: April 23, 1985